700DP. Death Penalty: Introduction to Penalty Phase

This [phase of the] trial is to determine (the/each) defendant's sentence. The law provides for two possible sentences: death or life in prison without the possibility of parole. You must decide which sentence (the/each) defendant will receive.

[Please disregard all of the instructions I gave you earlier. For this phase of the trial, I will give you a new set of instructions. Refer only to this new set of instructions in deciding the penalty.]

[1. The first step in this process is the opening statements.

2. Next, the People will offer evidence. Evidence usually includes witness testimony and exhibits. After the People's case, the defense (will/may) also present evidence.

3. After you have heard all the evidence and [before] the attorneys have given their final arguments, I will instruct you on the law that applies to the case.

4. After you have heard the arguments and instructions, you will go to the jury room to deliberate and reach a decision.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718.) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt, supra,* 45 Cal.3d at p. 718, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982, cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058.) In order to avoid confusion, the court should use this instruction and provide the jury with a completely new set of instructions for the penalty phase. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.)

The court has a **sua sponte** duty to give the bracketed paragraph instructing the jury to disregard all previous instructions unless the current jury did not hear the

guilt phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171, cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251.)

This instruction **must** be followed by any other introductory instructions the court deems appropriate prior to the presentation of penalty phase evidence such as the following: Instruction 20, Cautionary Admonitions: Jury Conduct (After Jury Is Selected); Instruction 30, Note-Taking; Instruction 50, Evidence; and Instruction 60, Witnesses.

When Instruction 20, Cautionary Admonitions: Jury Conduct (After Jury Is Selected), is given, the court has a **sua sponte** duty to delete paragraph 10 of that instruction. (*People v. Lanphear* (1984) 36 Cal.3d 163, 165; *California v. Brown* (1987) 479 U.S. 538, 545.)

If the current jury did not hear the previous phases of the case, the court should give bracketed paragraphs 1–4.

AUTHORITY

Death Penalty Statute ▸ Pen. Code, § 190.3.
Must Tell Jury Which Instructions Apply ▸ *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26.
Should Give Jury New Set of Instructions ▸ *People v. Weaver* (2001) 26 Cal.4th 876, 982, cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058.
Error to Instruct Not to Consider Sympathy ▸ *People v. Easley* (1983) 34 Cal.3d 858, 876; *People v. Lanphear* (1984) 36 Cal.3d 163, 165; *California v. Brown* (1987) 479 U.S. 538, 545.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 495.

STAFF NOTES

Pen. Code, § 190.3:

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to

evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense

and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state rison for a term of life without the possibility of parole.

Sympathy Factor

"[United States Supreme Court cases] make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the evidence before it." (*People v. Robertson* (1982) 33 Cal.3d 21, 58.)

"Do Not Consider Sympathy" Instruction from Guilt Phase—Error

The standard introductory instructions inform the jury not to consider "sympathy for the defendant" in deciding the case. This created problems in the context of capital trials:

In introductory remarks to the prospective jurors during the voir dire, the court said: "You will be instructed over and over again that *you are not to base your decision in this matter on sympathy for the defendant* or sympathy for the victim. You are not to base your decision on passion or prejudice or public opinion or public feeling." (Italics added.) Later, following the completion of testimony and closing arguments, the court commenced its charge to the jury with CALJIC No. 1.00, which included this admonition: "As jurors, *you must not be influenced by pity for a defendant* or by prejudice against him. *You must not be swayed by mere sentiment, conjecture, sympathy*, passion, prejudice, public opinion, or public feeling." (Italics added.) As we concluded in *Easley*, federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any "sympathy factor" raised by the

> evidence when determining the appropriate penalty. (34 Cal.3d 858, 876.) The trial court erred, therefore, in instructing in the language of CALJIC No. 1.00 in this penalty trial.

(*People v. Lanphear* (1984) 36 Cal.3d 163, 165.)

> The instructions in this case did not make clear to the jury its option to reject death if the evidence aroused sympathy or compassion. The instructions were inconsistent and ambiguous in advising both that the jury must not be swayed by pity or influenced by sympathy for the defendant, and that it should consider circumstances which "in fairness and mercy, must be considered in extenuating or reducing the degree of moral culpability." Because they also failed to tell the jury that any aspect of the defendant's character or background could be considered mitigating and could be a basis for rejecting death even though it did not necessarily lessen culpability, the instructions were constitutionally inadequate.

(*Id.* at p. 168.)

In *California v. Brown* (1987) 479 U.S. 538, 545, in a plurality opinion, the U.S. Supreme Court held that giving the general instruction not to consider sympathy at the beginning of the guilt phase of a capital trial did not in itself mandate reversal. Justice O'Connor concurred in the lead opinion, joined by four justices, stating:

> [A]n instruction informing the jury that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution. At the same time, the jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime.

(*Ibid.*)

Following *California v. Brown, supra,* the California Supreme Court has assessed the impact of the "sympathy" instruction by reviewing the instructions as a whole. (See *People v. Babbit* (1988) 45 Cal.3d 660, 718 [see also cases cited therein].) Using this approach, the court frequently finds the error to be harmless. (*Ibid.*) Nevertheless, failure to clarify that the "sympathy" instruction does not apply to penalty phase is error.

Must Tell Jury Which Instruction Apply

Following the previous rulings on the "sympathy" instruction, the court was confronted with a more global challenge to the potential confusion of guilt and penalty phase instructions:

> Defendant claims that the trial court's failure sua sponte to instruct the jury as to which of the guilt and sanity phase instructions applied in the penalty phase denied him a fair penalty phase trial. He asserts that if the jurors ignored all the guilt and sanity phase instructions in their penalty deliberations, then it left the jury without guidance as to how to assess witness credibility and created the possibility of an adverse inference from defendant's failure to testify. If, on the other hand, the jury believed that the guilt and sanity phase instructions applied at the penalty phase, defendant was denied a fair penalty determination because the jury was instructed at the guilt phase not to be influenced by sympathy for defendant and to disregard the consequences of its decision.

(*People v. Babbit* (1988) 45 Cal.3d 660, 717). The court concluded that no prejudicial error had been committed in *Babbit, supra*, but stated:

> To avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply.

(*Id.* at p. 718, fn. 26.)

Based on this ruling, CALJIC now recommends that the trial court give a completely new set of penalty phase instructions, telling the jury to disregard previous instructions. (See CALJIC 8.84.1, Notes.) This approach was endorsed by the court in *People v. Weaver* (2001) 26 Cal.4th 876, 982:

> Defendant is correct that the trial court's failure to specify which of the previously delivered instructions continued to apply at the penalty phase was potentially misleading. [Quote from *Babbit, supra*, omitted . . . .] The current applicable pattern instruction, CALJIC No. 8.84.1 (6th ed. 1996), provides that the jury at the penalty phase should "[d]isregard all other instructions given to you in other phases of this trial." In the Use Note to CALJIC No. 8.84.1, the authors explain that the instruction "should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88. [P] Our recommended procedure may be more

> cumbersome than the suggestion advanced in footnote number 26 [of *Babbitt*, *supra*, at p. 718], but the Committee believes it is less likely to result in confusion to the jury."

Must Render Verdict "Regardless of Consequences"—Error

> Defendant contends it was prejudicial error to instruct the jury in these words: "Both the People and the defendant have a right to expect you'll conscientiously consider and weigh the evidence and apply the law of the case and that you will reach a just verdict as to penalty regardless of what the consequences of such verdict may be."
>
> At the penalty stage of a capital case, an instruction that the jurors should not consider the consequences of their verdict is potentially confusing and should not be given. (*People* v. *Brown* (1985) 40 Cal.3d 512, 537, fn. 7.)

(*People v. Hayes* (1990) 52 Cal.3d 577, 643-644; see also *People v. Nicolaus* (1991) 54 Cal.3d 551, 587.)

Should Instruct to Disregard Prior Instructions

In order to avoid error resulting from instructions given at the guilt phase, such as that quoted above, the court must clearly inform the jury to disregard all previous instructions:

> Defendant claims the court erred by failing to instruct sua sponte that the penalty jury must not follow the guilt phase instruction to render a "just verdict regardless of the consequences" (CALJIC No. 1.00). [. . .]
>
> We are not persuaded. As defendant concedes, the jury received a blanket cautionary admonition to "[d]isregard *all* other instructions given to you in other phases of this trial." (Italics added.)
>
> Moreover, the jury was specifically instructed that it could consider, in mitigation, "[a]ny other circumstance which extenuates the gravity of the crime, even though it may not be a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." [Italics ommitted.] An addendum was attached to this

particular instruction that "[y]ou must disregard any jury instructions given to you in the [guilt] or innocence phase [of] this trial which conflicts with this principle."

(*People v. Arias* (1996) 13 Cal.4th 92, 171.)

701DP. Death Penalty: Duty of Jury

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1. I will now instruct you on the law that applies to this [phase of the] case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions so that you can follow along as I read them to you.]

[2. Refer only to these instructions and disregard any instructions I gave you during the previous phase[s] of this case.]

3. You must decide whether (the/each) defendant will be sentenced to death or life in prison without the possibility of parole. It is up to you and you alone to decide what the sentence will be. [In reaching your decision, consider all of the evidence from the entire trial [unless I specifically instruct you not to consider something from an earlier phase].]

4. You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments conflict with my instructions, you must follow my instructions.

5. Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

6. Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. Please be sure to listen carefully and follow the definitions that I give you.

7. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have decided what the facts are, you may conclude that some instructions do not apply. You must then follow the instructions that do apply in reaching your verdict.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718.) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must

clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982, cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058.) In order to avoid confusion, the court should use this instruction and provide the jury with a completely new set of instructions for the penalty phase. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.)

The court has a **sua sponte** duty to give bracketed paragraph 2, instructing the jury to disregard all previous instructions, unless the current jury did not hear the guilt phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171, cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251.)

The court should give the bracketed portion of paragraph 7 unless the court will be commenting on the evidence pursuant to Penal Code section 1127. The committee recommends against any comment on the evidence in the penalty phase of a capital case.

This instruction should be followed by any other general instructions on evidence or principles of law the court deems appropriate based on the facts of the case. Specifically:

- The court has a **sua sponte** duty to give Instruction 120, Evidence and Instruction 130, Witnesses. (See *People v. Miranda* (1987) 44 Cal.3d 57, 107-108.)

- The court has a **sua sponte** duty to give Instruction 110, Reasonable Doubt if the prosecution offers aggravating evidence of other criminal conduct or other felony convictions. However, the reasonable doubt standard does not apply to the question of whether the jury should impose the death penalty or to proof of other aggravating factors. (*People v. Miranda, supra,* 44 Cal.3d at p. 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779.)

- If the prosecution relies on circumstantial evidence to prove other criminal conduct, the court has a **sua sponte** duty to instruct on circumstantial evidence in the penalty phase. (See *People v. Brown* (2003) 31 Cal.4th 518, 564 [no error where prosecution relied exclusively on direct evidence].)

- When requested, the court must give instructions admonishing the jury not to consider the defendant's failure to testify during the penalty phase. (*People v. Melton* (1988) 44 Cal.3d 713, 757–758.)

AUTHORITY

Death Penalty Statute ▸ Pen. Code, § 190.3.

Must Tell Jury Which Instructions Apply ▸ *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26.

Should Give Jury New Set of Instructions ▸ *People v. Weaver* (2001) 26 Cal.4th 876, 982, cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058.

Error to Instruct Not to Consider Sympathy ▸ *People v. Lanphear* (1984) 36 Cal.3d 163, 165; *California v. Brown* (1987) 479 U.S. 538, 545.

Reasonable Doubt ▸ *People v. Miranda* (1987) 44 Cal.3d 57, 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779.

Circumstantial Evidence ▸ *People v. Brown* (2003) 31 Cal.4th 518, 564.

Defendant's Failure to Testify ▸ *People v. Melton* (1988) 44 Cal.3d 713, 757–758.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 495.

STAFF NOTES

See Staff Notes to 700DP: Death Penalty: Introduction to Penalty Phase.

702DP. Death Penalty: Factors to Consider

In reaching your decision, you must consider and weigh the aggravating and mitigating factors or circumstances shown by the evidence.

An *aggravating circumstance* is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

A *mitigating circumstance* is any fact, condition, or event that may be considered as an extenuating circumstance in determining the appropriateness of the death penalty, even though it does not necessarily justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Under the law, you must consider, weigh, and be guided by specific factors, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

The only factors you may consider as aggravating circumstances are:

(a) The circumstances of the crime that the defendant was convicted of in this case and any special circumstances that were found true.

(b) Any other violent criminal activity the defendant committed besides the crime[s] that resulted in conviction[s] in this case. Violent criminal activity involves the unlawful use or attempted use of force or violence or the [direct or indirect] threat to use force or violence.

(c) Any other felony that the defendant has been convicted of besides the crime[s] in this case.

(d) The defendant's age at the time of the crime.

You may not consider as an aggravating factor anything other than the aggravating factors I have just listed. You must not take into account any other facts or circumstances as a basis for imposing the death penalty.

[If any fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact as only one factor in your weighing process, not two.]

Factors that you may consider as mitigating circumstances include:

(a) The circumstances of the crime[s] the defendant was convicted of in this case and any special circumstance[s] that were found true.

(b) The absence of any violent criminal activity by the defendant besides the crime[s] that (he/she) was convicted of in this case.

(c) The absence of any felony convictions of the defendant besides the crime[s] in this case.

(d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] that (he/she) was convicted of in this case.

(e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct.

(g) Whether the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether at the time of the offense the defendant's ability to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.

(i) The defendant's age at the time of the crime.

(j) Whether the defendant was an accomplice to the offense and (his/her) participation was relatively minor.

(k) Any other circumstance that lessens the gravity of the crime even though the circumstance is not a legal excuse. You must consider anything the defendant has offered as a basis for a sentence less than death, including but not limited to any mitigating or sympathetic circumstances of the crime and of the defendant's character, background, history, or mental or physical condition. In reaching your decision, you may consider sympathy or compassion for the defendant or anything you consider to be a mitigating factor, whether or not I have specifically mentioned it here.

As you see, there are two factors that may be either aggravating or mitigating: the circumstances of the crime that the defendant was convicted of in this case and the defendant's age at the time of the crime. It is for you to determine whether these factors are aggravating or mitigating circumstances.

Mitigating factors are unlimited. Those listed here are just examples of some of the factors you may take into account in deciding not to impose a death sentence. Consider any fact or circumstance that you believe to be mitigating in deciding the question of penalty. Although a number of possible mitigating factors have been listed, you must not consider the absence of any such factor as an aggravating circumstance.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605; *People v. Benson* (1990) 52 Cal.3d 754, 799.)

Although not required, "[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record." (*People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105; *People v. Melton* (1988) 44 Cal.3d 713, 770.) The jury must be instructed to consider only those factors that are "applicable." (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

On request, the court must instruct the jury not to double-count any "circumstances" of the crime that are also "special circumstances." (*People v. Melton* (1988) 44 Cal.3d 713, 768.)

AUTHORITY

Death Penalty Statute ▸ Pen. Code, § 190.3.

Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy ▸ *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Easley* (1983) 34 Cal.3d 858, 876.

Should Instruct on All Factors ▸ *People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110.

Must Instruct to Consider Only "Applicable Factors" ▸ *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110.

Mitigating Factor Must Be Supported by Evidence ▸ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277.

Definitions of Aggravating and Mitigating ▸ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270.

On Request Must Instruct to Consider Only Statutory Aggravating Factors ▸ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.

Mitigating Factors Are Unlimited ▸ *People v. Ochoa* (1998) 19 Cal.4th 353, 454, cert. den. sub nom. *Ochoa v. California* (1999) 528 U.S. 862; *People v. Melton* (1988) 44 Cal.3d 713, 760; *Belmontes v. Woodford* (2003) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir., Nov. 20, 2003)—awaiting final pagination].

Must Instruct Not to Double-Count ▸ *People v. Melton* (1988) 44 Cal.3d 713, 768.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 462, 466, 467, 475, 480, 483, 484, 493–497.

RELATED ISSUES

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury only to consider the aggravating factors listed. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.) The committee has drafted the instruction to identify the aggravating and mitigating factors to avoid juror confusion on this issue.

Factors That Are Only Mitigating—(d), (e), (f), (g), (h), and (k)
"[F]actors (d), (e), (f), (h), and (k) can only mitigate. While the prosecutor could properly point to the absence of mitigating evidence in these categories, he could not argue that such deficiency was itself aggravating." (*People v. Whitt* (1990) 51 Cal.3d 620, 654.) "Factors (f) and (g) . . . are mitigating factors . . . ." (*People v. Visciotti* (1992) 2 Cal.4th 1, 74; see also *People v. Melton* (1988) 44 Cal.3d 713, 770.)

Age May Be Aggravating or Mitigating Factor
The "age" factor may be used by either the prosecution or the defense:

> In *People v. Lucky* (1988) 45 Cal.3d 259, we explained that mere chronological age is not in and of itself an aggravating or mitigating factor. "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience of morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue such age-related inference in every case." (*Id*. at p. 302.)

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 587.) However, the prosecution may only argue "age" as it relates to "this defendant's individual character or background, or to the circumstances of this particular offense." (*Id.* at p. 588 [improper to argue death penalty appropriate because defendant will not live much longer naturally].)

Factor (j)—Undetermined but Weight of Authority States Only Mitigating
There is currently a split in cases over whether factor (j), the defendant's role in the crime, may be considered an aggravating factor or is exclusively a mitigating factor. (*People v. Proctor* (1992) 4 Cal.4th 499, 553.) However, *Proctor* observed that 13 cases have stated that factor (j) is a mitigating factor while 1 case stated that it may be an aggravating factor. *(Ibid.)*

Aggravating Factors—Proof Beyond a Reasonable Doubt
The aggravating factors of other criminal activity and felony convictions must be proved beyond a reasonable doubt. (*People v. Smith* (2003) 30 Cal.4th 581, 638.) The other aggravating factors do not have to be proved beyond a reasonable doubt. *(Ibid.)*

Mitigating Factors—Pinpoint Instructions
If the court instructs the jury that it may consider any relevant mitigating evidence, the court need not give pinpoint instructions highlighting exactly what the defense

argues is mitigating evidence in the case. (*People v. Yeoman* (2003) 31 Cal.4th 93, 152–154; *People v. Brown* (2003) 31 Cal.4th 518, 569.)

Lingering Doubt

Although the defense may argue lingering doubt, the court is not required to instruct the jury specifically to consider this as a mitigating factor. (*People v. Brown* (2003) 31 Cal.4th 518, 567.)

STAFF NOTES

Note: Underlined portions of quotes represent language that has been incorporated into the instruction (all of the statutory factors, (a)-(k) have also been incorporated though not underlined).

Pen. Code, § 190.3:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.
>
> However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.
>
> However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.
>
> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be

presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

Definitions of "Aggravating" and "Mitigating"

The court has held that it is not error if the court fails to define the terms "aggravating" and "mitigating." (*People v. Ochoa* (1998) 19 Cal.4th 353, 458.) However, the court approved of the definitions for these terms given in *People v. Dyer* (1988) 45 Cal.3d 26, 77-78, and *People v. Adcox* (1988) 47 Cal.3d 207, 269-270.

In *People v. Dyer* (1988) 45 Cal.3d 26, 77-78, the court stated:

> During discussions on what jury instructions would be given, the prosecutor objected to a proposed defense instruction defining "mitigating" evidence because "it only talks about mitigating circumstances. [. . .] The court and the prosecutor agreed, over defense counsel's objection, that Black's Law Dictionary would provide a suitable definition for aggravating circumstances.
>
> Accordingly, the court instructed the jury as follows: "para. You are instructed that an aggravating circumstance is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself. para. You are

> instructed that a mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the offense in question, but which may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. para. It will be your duty . . . to determine which of the two penalties . . . shall be imposed on the defendant. After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." [Italics removed.]
>
> The foregoing definitions of aggravation and mitigation provided a helpful framework within which the jury could consider the specific circumstances in aggravation and mitigation set forth in section 190.3. We find no error in the presentation of both definitions to the jury, and we find no prejudice in light of the instruction limiting the jury's consideration to "the applicable factors of [aggravation]."

(*Ibid*.)

Similarly, in *People v. Adcox* (1988) 47 Cal.3d 207, 269-270, the court stated:

> Shortly after commencing their deliberations, the jury requested the court to define "aggravating" and "mitigating." In discussing the matter with the court, both the prosecutor and defense counsel stated they knew of no pertinent cases specifically defining those terms. The court, with both counsel and defendant personally in agreement, ultimately responded by giving the jury the definitions of "aggravation" and "mitigation" found in Corpus Juris Secundum, as follows: "Aggravation. Any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, . . . but which is above and beyond the essential constituents of the crime or tort itself" (3 C.J.S., at p. 507); "Mitigating circumstances. Such circumstances as do not amount to a justification or excuse of the offense or act in question but may properly be considered in mitigation, or reduction, of the punishment. . . ." (14 C.J.S., at p. 1123.)
>
> We recently found no prejudice from the reading of nearly identical definitions in *People* v. *Dyer*, *supra*, 45 Cal.3d at pages 77-78. Indeed, we concluded that such definitions "provided a helpful framework within which the jury could consider the specific

> circumstances in aggravation and mitigation set forth in section 190.3." (*Ibid*.) As in *Dyer*, here the jury was also instructed that, "you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (Former CALJIC No. 8.84.2.) Accordingly, we find no error or prejudice in the presentation of both definitions to the jury.

(*People v. Adcox* (1988) 47 Cal.3d 207, 269-270.)

CALJIC was subsequently revised to incorporate these definitions. In *People v. Benson* (1990) 52 Cal.3d 754, 800, the court approved of the following CALJIC definitions:

> Mitigating circumstances are any circumstances that do not constitute a justification or excuse of the offenses in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.
>
> Aggravating circumstances are any circumstances are any circumstances [*sic*] attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves. [. . .]

More recently, the court approved of these definitions, given in CALJIC:

> n20 CALJIC No. 8.88 provides: "An aggravating factor is any fact, condition or event attending the commission of a crime which increases [its] guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. [P] A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."

(*People v. Brown* (2003) 31 Cal.4th 518, 565; see also *People v. Smith* (2003) 30 Cal.4th 581, 636.)

In as least two published cases in which these definitions were given, juries asked for a definition of the term “extenuating circumstance." (*People v. Smith* (2003) 30 Cal.4th 581, 636; *People v. Lucero* (2000) 23 Cal.4th 692, 723.)

The Oxford English Dictionary defines a “mitigating circumstance” as: “a fact or situation which reduces culpability for an offence and permits greater leniency in judgment or punishment; = *extenuating circumstances*.” (The Oxford English Dictionary Online (Draft entry 2002) http://dictionary.oed.com/entrance.dtl.) The OED defines “extenuating” as, “[t]hat extenuates in senses of the [verb]. Now chiefly in phrase *extenuating circumstances*: circumstances that tend to diminish culpability.” (The Oxford English Dictionary Online (2nd Ed. 1998) http://dictionary.oed.com/entrance.dtl.)

Should Instruct on All Factors in Every Case

> It is, of course, the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record.
>
> Such an instruction "ensures that the jury is aware of the complete range of factors that the state considers relevant to the penalty determination. With that knowledge the jury is better able to place the individual defendant's conduct in perspective, and thus its exercise of discretion to select the appropriate penalty is further channeled and directed as required by the Eighth Amendment." [Citation.]
>
> Such an instruction also avoids the risk that a factor that is indeed applicable on a given record may nevertheless be erroneously omitted. [Citation.] This risk is grave insofar as the defendant's interests are concerned: "deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant.” [Citations.]
>
> Nevertheless, it is not the law that the court is obligated to instruct on all the statutory penalty factors sua sponte.

(*People v. Marshall* (1990) 50 Cal.3d 907, 932.)

Jury Must be Instructed to Consider "Applicable Factors"

> Petitioner contends that his constitutional rights were violated by the trial court's failure to delete the irrelevant factors from the California death penalty statute, Cal. Penal Code § 190.3.
>
> The jury in petitioner's case was instructed that it was to consider the listed factors "if applicable." (CT 559.) The words "if applicable" told the jury that not all of the factors would be relevant and that they should not consider the factors that did not apply.

(*Williams v. Calderon* (1998) 48 F.supp.2d 979, 1023.)

As noted above, the court in *People v. Marshall* (1990) 50 Cal.3d 907, 932, directed, "the better practice for a court [is] to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record."

Limitations on Aggravating Evidence—Not Required to Identify Factors as Mitigating or Aggravating

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." (*Ibid.*)

However, the court has also recognized that the Due Process Clause of the United States Constitution limits what the jury may consider as an "aggravating factor":

> [I]t is settled that the due process clause of the Fourteenth Amendment prohibits the states from "attach[ing] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty . . . ." (*Zant* v. *Stephens* (1983) 462 U.S. 862, 885.) Evidently, it also bars use of decision-making processes that may be understood to incorporate such "mislabeling" and thereby threaten arbitrary and capricious results.

(*People v. Benson* (1990) 52 Cal.3d 754, 800.)

Defendants have attacked the CALJIC jury instructions for failing to identify which of the listed factors is aggravating and which mitigating because of the risk that jurors will impermissibly use some of the listed mitigating factors in aggravation:

> Defendant contends that the court erred by instructing the jury as it did on aggravating circumstances and mitigating circumstances. His attack is directed against the court's failure to identify which circumstances were "aggravating" and which "mitigating," and its failure to state that the absence of mitigation did not amount to the presence of aggravation. He claims that in this regard the charge was inconsistent with the federal constitutional principles stated above.

(*Ibid.* [footnote omitted].) The court in *People v. Benson*, *supra*, rejected this claim. The court concluded that the definitions of mitigation and aggravation, along with the description of the weighing process, contained in the current CALJIC No. 8.88, sufficiently explained to the jurors the meaning of the terms and the role of the jurors in the process. (*Id.* at p. 802.) In concluding that these instructions met constitutional requirements, the court stated:

> Further, a reasonable juror could not have "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty . . . ." (*Zant* v. *Stephens*, *supra*, 462 U.S. at p. 885.)
>
> Defendant's claim to the contrary notwithstanding, a reasonable juror would readily have identified which circumstances were "aggravating" and which "mitigating." Again, this conclusion is virtually compelled by the plain language used in the definitions of "aggravating circumstances" and "mitigating circumstances," and in the description of the "weighing" process. Certainly, such a juror could not have inferred -- contrary to governing law (see *People* v. *Davenport* (1985) 41 Cal.3d 247, 288-289 (plur. opn.)) -- that extreme mental or emotional disturbance and diminished capacity were circumstances in aggravation. Defendant argues in substance that a reasonable juror might have understood these circumstances as indicia of future dangerousness and hence as grounds for the ultimate sanction. We are not persuaded. It is pellucid in the very words of the instructions that both circumstances looked to the past, not the future, and supported life, not death.
>
> Again notwithstanding defendant's claim, a reasonable juror could not have believed -- contrary to governing law (see *People* v. *Davenport*, *supra*, 41 Cal.3d at pp. 288-289 (plur. opn.)) -- that the absence of mitigation amounted to the presence of aggravation. The

> instructions made plain that aggravation required the *existence* of "circumstances attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves" -- and not merely the *nonexistence* of "circumstances . . . which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

(*Id.* at pp. 801-802 [italics in original].)

Limitations on Aggravating Evidence—Error to Instruct Any Factor May Aggravate

Although the court is not required to identify the aggravating and mitigating factors for the jury, it is error for the court to instruct the jury that any factor may be considered in aggravation:

> [T]he trial court instructed the jury that, in determining the penalty, it must consider and be guided by 11 factors, if applicable. The trial court added: "The factors which I have just listed for you may be considered by you, if applicable, as either aggravating factors or mitigating factors. [P] If you find any of these factors to be aggravating, and to have been established by the evidence, you may consider them in determining the penalty you will impose in this case."
>
> Defendant contends this instruction was erroneous. He is correct. A majority of the 11 statutory factors can only be mitigating.

(*People v. Wader* (1993) 5 Cal.4th 610, 657 [citations omitted.].)

Limitations on Aggravating Evidence—Must Instruct on Request that Jury is Limited to Statutory Aggravating Factors

Although not required to identify the factors as either aggravating or mitigating, the trial court must, on request, instruct the jury that it may only consider the statutory aggravating factors (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275 fn.14.) The court has made two proclamations on how this advisement should be worded. In *People v. Gordon, supra,* 50 Cal.3d at p. 1275 fn. 14, the court stated:

> [O]n request a court must give an instruction stating that the jury may consider only penalty factors (a) through (j), and evidence relevant thereto, in determining aggravation. [Citation.]

This instruction was given in *People v. Hillhouse, supra*, 27 Cal.4th at p. 508. The trial court instructed as follows:

> The factors A through J which I have just listed are the only factors that can be considered by you as aggravating factors, and you cannot take into account any other facts or circumstances as a basis for imposing the penalty of death on the defendant. [P] If you find any of those factors to be aggravating and to have been established by the evidence, you may consider them in deciding the penalty you will impose in this case. [P] Although a number of possible mitigating factors have been listed, you cannot consider the absence of any such factors in this case as an aggravating factor. Aggravating factors are limited to those which have been listed for you in these instructions.

(*Ibid.*)

However, in *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 508, the court found fault with its own instruction. The court agreed with the defendant that the instruction was potentially misleading because it presented the possible ambiguity that the jury might consider as aggravating factors which legally could only be mitigating factors, specifically factors (d), (f) and (g). (*Ibid.*). The court stated,

> To avoid any possible ambiguity in the future, we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors.

(*Ibid.* at fn. 6.)

In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269, the court affirmed the giving of an instruction that, "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (italics in original).

Staff has drafted the instruction along the lines of *People v. Musselwhite, supra*, specifically identify the statutory aggravating factors for the jury. Instructing the jurors that they may only consider "the statutory aggravating factors," without explaining what these are, will invite confusion.

Individualized Decision--Jury Must Consider Any Mitigating Evidence

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [. . .] Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. [. . .]
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* 91978) 438 U.S. 586, 604-605 [footnotes omitted, emphasis in original].)

> The Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. [Citation.] The sentencer may determine the weight to be given relevant mitigating evidence. But it may not give it no weight by excluding such evidence from its consideration. [Citations and quotation marks omitted.] [. . . .]
>
> To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. [I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. [Citation and quotation marks omitted.] Rather, the trial judge's instructions must convey that the sentencer may not be precluded from

> considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citation and quotation marks omitted.]

(*Belmontes v. Woodford* (2003) 335 F.3d 1024, 1061 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir. Cal., Nov. 20, 2003)—awaiting final pagination].)

Jury Must be Instructed to Consider Sympathy or Other Mitigating Factors

> [United States Supreme Court cases] make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the evidence before it.

(*People v. Robertson* (1982) 33 Cal.3d 21, 58.)

> The instructions in this case did not make clear to the jury its option to reject death if the evidence aroused sympathy or compassion. The instructions were inconsistent and ambiguous in advising both that the jury must not be swayed by pity or influenced by sympathy for the defendant, and that it should consider circumstances which "in fairness and mercy, must be considered in extenuating or reducing the degree of moral culpability." Because they also failed to tell the jury that any aspect of the defendant's character or background could be considered mitigating and could be a basis for rejecting death even though it did not necessarily lessen culpability, the instructions were constitutionally inadequate.

(*People v. Lanphear* (1984) 36 Cal.3d 163, 165.)

> [T]he jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime.

(*California v. Brown* (1987) 479 U.S. 538, 545.)

Expanded Factor (k) Instruction

Factor (k) provides for the jury to consider, “Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the

crime." (Pen. Code § 190.3(k).) In *People v. Easley* (1983) 34 Cal.3d 858, 876, the court concluded that instruction solely in the statutory language quoted was insufficient to inform the jurors that they may consider any mitigating evidence offered by the defendant:

> CALJIC No. 8.84.1 -- while listing a variety of aggravating and mitigating factors -- does not explicitly inform the jury that it may consider *any* mitigating factor proffered by the defendant. [. . .]
>
> n.10 In order to avoid potential misunderstanding in the future, trial courts -- in instructing on the factor embodied in section 190.3, subdivision (k) -- should inform the jury that it may consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and any other "aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett, supra*, 438 U.S. at p. 604 [57 L.Ed.2d at p. 990].)

(*Ibid.;* see also *People v. Miranda* (1987) 44 Cal.3d 57, 102.)

The language of *Easley, supra,* as well as language from several of the cases quoted above has been incorporated into the CALJIC instruction on factor (k). The resulting instruction has become known as the "expanded factor k" instruction.

Appropriate to Instruct Jury to Consider Sympathy for Defendant or "Any Mitigating Factor"

> [T]he jury was given this instruction: "You may take sympathy for the defendant into consideration in determining whether or not to extend mercy to the defendant." [. . .]
>
> Another instruction that defendant requested told the jury, as relevant here: "Mitigating factors are unlimited. Anything mitigating should be considered. Mitigating factors provided in the instructions are merely examples of some of the factors you may take into account in deciding whether or not to impose a death penalty."

(*People v. Ochoa* (1998) 19 Cal.4th 353, 454; similar instruction given in *People v. Melton* (1988) 44 Cal.3d 713, 760.)

In *Belmontes v. Woodford* (2003) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir. Cal., Nov. 20,

2003)—awaiting final pagination], the trial court gave these special instructions, requested by the defense:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.
>
> [. . .] [Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances . . . as reasons for not imposing the death sentence.

Even with these instructions, the Ninth Circuit Court of Appeals concluded that the jury instructions, taken as a whole, failed to inform the jurors that they could consider any mitigating factors. The trial court instructed the jury with the "unadorned factor (k)" instruction, failed to inform the jurors that they could consider whether the defendant would adapt to prison life, and specifically told the jurors they could not consider whether the defendant would receive counseling in prison and. (*Id.* at pp. 1062-1065.) In reversing the penalty phase, the Ninth Circuit noted,

> The trial judge started out on the right track by instructing the jury that it should view the statutory factors "merely as examples of some of the factors" that it could consider. However, any clarity gained at the outset of the instruction was immediately undone by a superceding qualifying directive. The judge added, "You should pay careful attention to each of these factors," an instruction that a reasonable juror would almost certainly have understood to refer to the statutory factors, and particularly to the unconstitutionally limiting unadorned factor (k). The trial judge then continued, "Any one of them [i.e., the factors] standing alone may support a decision that death is not the appropriate punishment in this case," implying that only a statutory factor can support a sentence less than death. A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence--evidence not going to culpability--such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment.

(*Id.* at p. 1065.)

Factors (b) and (c) Apply to Other Crimes Only

> Defendant contends the trial court erred in failing sua sponte to modify CALJIC No. 8.84.1 to make clear that section 190.3, subdivisions (b) and (c) applied only to "other crimes." We agree that subdivisions (b) and (c) pertain only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding. It would therefore be improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision. [. . .]
>
> fn. 28 [. . .] [T]he trial court in the future should expressly instruct that subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination.

(*People v. Miranda* (1987) 44 Cal.3d 57, 105-106 [footnote omitted].)

"**Extreme" Mental or Emotional Distress**

> In accordance with section 190.3, factor (d) (CALJIC No. 8.84.1), the jury was instructed to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Defendant asserts that this instruction, by referring to an "extreme" mental or emotional condition, misled the jury into believing that any "lesser disturbance would not suffice and could not be considered." We cannot agree.
>
> Pursuant to CALJIC No. 8.84.1, the jury was given an "expanded" factor (k) instruction [. . . .]
>
> In *People* v. *Ghent* (1987) 43 Cal.3d 739, we concluded that this "catchall" expanded factor (k) provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed "extreme," nonetheless mitigates the seriousness of the offense.

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 586-587 [quotation marks and citations omitted]; see also *People v. Cox* (2003) 30 Cal.4th 916, 966.)

Age Can be Either Mitigating or Aggravating

> In *People* v. *Lucky* (1988) 45 Cal.3d 259 [247 Cal.Rptr. 1, 753 P.2d 1052], we explained that mere chronological age is not in and of itself an aggravating or mitigating factor. "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience of morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue such age-related inference in every case." (*Id*. at p. 302.)

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 587.) Thus, the prosecutor may argue that the defendant was mature enough to fully understand the nature of his actions. (*Ibid.*) However, the prosecution may not argue "age-related" matters that do not reflect on the defendant's character:

> [T]he prosecutor also argued to the jury, "You can consider Mr. Nicolaus' age also in terms of the fact that the death penalty for Mr. Nicolaus will not deprive him of a long or potentially productive life as it would a young man." This was clearly improper argument. It did not purport to refer to any age-related matter that might have impacted defendant's character. Instead, it implied that the life of an individual more advanced in years might somehow be worth less than that of a younger individual. Although such a concept may have valid application in the determination of certain compensatory tort damages, it has no proper place in a death penalty case. [. . .] The comment in question bore no relation to this defendant's individual character or background, or to the circumstances of this particular offense.

(*Id.* at pp. 587-588.)

Factor (j)—Undecided if Aggravating as Well as Mitigating

> We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating [citing 13 cases.] Nonetheless, in *People v. Howard, supra,* 1 Cal.4th 1132, 1195, we approved the trial

> court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

(*People v. Proctor* (1992) 4 Cal.4th 499, 553.)

Need Not Instruct on Mercy

If an "expanded factor k instruction" is given, the court need not explicitly instruct the jury that it may reject the death penalty simply on the basis of mercy. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 588; *People v. Brown* (2003) 31 Cal.4th 518, 570.)

Not Appropriate to Instruct to Consider Sympathy for Defendant's Family

> [W]hat is ultimately relevant is a defendant's background and character--not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed. [. . .]
>
> In summary, we hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character. Nothing contrary to these principles occurred at trial.

(*People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

Lingering Doubt

"[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown* (2003) 31 Cal.4th 518, 567.)

Double Counting of Circumstances of Crime

In *People v. Harris* (1984) 36 Cal.3d 36, 64, the court ruled that the jury was improperly permitted to consider both robbery-murder and burglary-murder special circumstances arising out of the same course of conduct. The court held

that this impermissibly allowed the jury to "double-count" the circumstances of the crime. (*Ibid.*) This decision was overruled in *People v. Melton* (1988) 44 Cal.3d 713, 767:

> In our view, it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime.

The court observed, however, that the defendant was entitled to a limiting instruction on request:

> Of course the robbery and the burglary may not each be weighed in the penalty determination *more than once* for exactly the same purpose. The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the "circumstances" of the capital crime *and* any attendant statutory "special circumstances." Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any "circumstances" which were also "special circumstances." On defendant's request, the trial court should admonish the jury not to do so.

(*Id.* at p. 768.)

Must be Evidence of Mitigation

> [W]e never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.
>
> On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. [. . .]
>
> Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support

them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction.

(*Delo v. Lashley* (1993) 507 U.S. 272, 275, 277.)

703DP. Death Penalty: Evidence of Other Violent Crimes

The People allege as an aggravating circumstance that (the defendant/_____ <*insert name of defendant*>) committed _____ <*insert specific description of alleged offense[s]*>.

The People must prove beyond a reasonable doubt that (the defendant/_____ <*insert name of defendant*>) committed [each of] the alleged crime[s]. [Consider each of the alleged crimes separately.] If you have a reasonable doubt whether (the defendant/_____ <*insert name of defendant*>) committed an alleged crime, you must completely disregard any evidence of that crime. If the People have proved that (the defendant/_____ <*insert name of defendant*>) committed an alleged crime, you may consider the evidence of that alleged crime as an aggravating circumstance.

[The defendant committed [or attempted to commit] _____ <*insert name of offense*> if:

> <*INSERT ELEMENTS OF UNDERLYING FELONY, REPEATING FOR EACH OFFENSE ALLEGED IN AGGRAVATION.*>**]**

Each of you must decide for yourself whether the People have proved that the defendant committed an alleged crime. You do not all need to agree whether an alleged crime has been proved. If any juror individually concludes that an alleged crime has been proved, that juror may give the evidence whatever weight he or she believes is appropriate. On the other hand, if any juror individually concludes that an alleged crime has not been proved, that juror must disregard the evidence completely.

You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [except for the alleged prior felony conviction[s] about which I will now instruct you].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that alleged prior crimes offered in aggravation must be proved beyond a reasonable doubt. (*People v. Robertson*

(1982) 33 Cal.3d 21, 53–55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.) Evidence of prior crimes is limited to offenses involving the "use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).)

The prosecution must specify what prior crimes are alleged in aggravation and the court has a **sua sponte** duty to instruct the jury to consider only evidence relating to those alleged crimes. (*People v. Robertson* (1982) 33 Cal.3d 21, 55; *People v. Yeoman* (2003) 31 Cal.4th 93, 151.)

When requested by the defense, the court must instruct on the elements of the alleged prior offense. (*People v. Brown* (2003) 31 Cal.4th 518, 571; (*People v. Cox* (2003) 30 Cal.4th 916, 964; *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [rule not changed by *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490], cert. den. sub nom. *Anderson v. California* (2002) 534 U.S. 1136.) However, the court is not required to instruct on the elements sua sponte. (*People v. Brown*, *supra*, 31 Cal.4th at p. 571; *People v. Cox*, *supra*, 30 Cal.4th at p. 964.) The defense may, for tactical reasons, prefer not to have the jury hear the elements. Use the bracketed paragraph inserting the elements of the offense when requested.

The court has a **sua sponte** duty to give any necessary instructions on defenses to the alleged prior crimes, including instructions on voluntary intoxication as a defense. (*People v. Montiel* (1993) 5 Cal.4th 877, 942.)

Give the bracketed portion in the final paragraph when the court is also instructing the jury on prior felony convictions alleged in aggravation. (See Instruction 704DP, Death Penalty: Conviction for Other Felony Crimes.)

If the case involves only one defendant, the court should use the word "defendant" throughout the instruction. If the case involves codefendants tried jointly, the court should insert the name of the specific defendant alleged to have committed the prior crimes in the places indicated in the instruction.

AUTHORITY

Factor (b) ▸ Pen. Code, § 190.3.

Must Instruct on Reasonable Doubt ▸ *People v. Robertson* (1982) 33 Cal.3d 21, 53–55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.

Must Instruct Jury to Consider Only Specified Prior Crimes Evidence ▸ *People v. Robertson* (1982) 33 Cal.3d 21, 55; *People v. Yeoman* (2003) 31 Cal.4th 93, 151.

Instruct on Elements Only When Requested ‣ *People v. Brown* (2003) 31 Cal.4th 518, 571; *People v. Cox* (2003) 30 Cal.4th 916, 964; *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14, cert. den. sub nom. *Anderson v. California* (2002) 534 U.S. 1136.

Defense Instructions to Uncharged Crimes ‣ *People v. Montiel* (1993) 5 Cal.4th 877, 942.

Constitutional to Admit Evidence of Uncharged Crimes ‣ *People v. Balderas* (1985) 41 Cal.3d 144, 205; *People v. Brown* (2003) 31 Cal.4th 518, 571.

No Unanimity Requirement ‣ *People v. Benson* (1990) 52 Cal.3d 754, 811.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 473.

RELATED ISSUES

Need Not Instruct on Presumption of Innocence

The court is not required to instruct on the presumption of innocence regarding alleged prior crimes. (*People v. Benson* (1990) 52 Cal.3d 754, 809–810.)

No Unanimity Requirement

"We see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proved beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty." (*People v. Benson* (1990) 52 Cal.3d 754, 811.)

No Requirement to Instruct Jury Must Find "Violence or Threat of Violence" Beyond a Reasonable Doubt

The court is required to instruct the jury that the alleged prior crime must be proved beyond a reasonable doubt. However, the court does not have to instruct the jury that the fact that the alleged crime involved violence or the threat of violence must be proved beyond a reasonable doubt. (*People v. Ochoa* (2002) 26 Cal.4th 398, 453, cert. den. sub nom. *Ochoa v. California* (1999) 528 U.S. 862.)

May Use Same Conduct Under Factor (b) and Factor (c)

"Where violent 'criminal activity' results in a 'prior felony conviction,' it shows both a propensity for violence and an inability or unwillingness to be deterred by prior criminal sanctions. The jury was entitled to consider the relevance of defendant's prior conviction for both purposes under factors (b) *and* (c)." (*People v. Whitt* (1990) 51 Cal.3d 620, 654 [emphasis in original]; *People v. Yeoman* (2003) 31 Cal.4th 93, 156.)

STAFF NOTES

Pen. Code, § 190.3, in relevant part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [. . .]
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Must Instruct on Reasonable Doubt and Specify Prior Crimes Offered in Aggravation

> Defendant contends that the trial court committed prejudicial error in failing to instruct the jury *sua sponte* that in determining whether he should live or die, it could not properly consider the "other crimes" evidence as aggravating circumstances unless it first found that these crimes had been proven beyond a reasonable doubt. He points out that over a decade ago this court explained that "[it] is now settled that a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.]" (*People* v. *Stanworth* (1969) 71 Cal.2d 820, 840.) Furthermore, *Stanworth* also makes it clear that such an instruction is "vital to a proper consideration of the evidence, and the court should so instruct *sua sponte*." (*Id*., at p. 841; [citations].) [. . .]
>
> Accordingly, the trial court erred in failing to instruct the jury on this matter. [. . .]
>
> n. 19 In order to avoid potential confusion over which "other crimes" -- if any -- the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty. Without such a limiting instruction, there is no assurance that the jury will confine its

> consideration of other crimes to the crimes that the prosecution had in mind, because -- as already noted -- the jury is instructed at the penalty phase that in arriving at its penalty determination it may generally consider evidence admitted at all phases of the trial proceedings. (See former § 190.4, subd. (d).)

(*People v. Robertson* (1982) 33 Cal.3d 21, 53-55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.)

No Requirement to Instruct on Reasonable Doubt re: Violence

> Defendant asserts, however, that *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) requires the jury to find beyond a reasonable doubt that the evidence established the attempted, threatened, or actual use of force or violence. We reject this contention, and conclude *Apprendi* does not extend to require a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 sentencing factor.

(*People v. Ochoa* (2002) 26 Cal.4th 398, 453.)

Must Instruct Jury Not to Consider Other Conduct as Aggravating Evidence

> *People v. Robertson*, *supra*, 33 Cal.3d 21, addresses the danger of confusion that arises from evidence suggesting a defendant has committed crimes other than those of which the People have given formal notice under section 190.3 and sought to prove beyond a reasonable doubt. Absent instructions like CALJIC Nos. 8.86 and 8.87, there is no assurance the jury will consider only proper aggravating evidence. (*People v. Robertson*, *supra*, at p. 55, fn. 19.)

(*People v. Yeoman* (2003) 31 Cal.4th 93, 151.)

Instruct on Elements Only When Requested

> In *People v. Maury* (2003) 30 Cal.4th 342, 443, we stated that in the absence of a request, the trial court is under no duty to give an instruction at the penalty phase regarding evidence received at the guilt phase. [Citations.] Even when section 190.3, factor (b), criminal activity is expressly alleged, which was not the case here, 'the rule absolving the court of a sua sponte duty to instruct on the elements of crimes introduced under [section 190.3,] factor (b) is

> based in part on a recognition that, as [a] tactical matter, the defendant may not want the penalty phase instructions . . . [to] lead the jury to place undue emphasis on the crimes rather than on the central question of whether he should live or die. [Citations.]

(*People v. Cox* (2003) 30 Cal.4th 916, 964.)

> As we have explained: "[A] criminal defendant may have tactical reasons to forgo lengthy instructions on the elements of alleged other crimes. [Citation.] We fail to see how forcing a capital defendant to forgo this tactical option vindicates his federal constitutional rights. As we made clear in *Phillips* ... if a defendant requests an instruction explaining the elements of the other crimes at issue, he is entitled to have the jury so instructed." (*People v. Hardy*, *supra*, 2 Cal.4th at p. 207, citing *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25.)

(*People v. Brown* (2003) 31 Cal.4th 518, 571.)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14, the court held that this rule was not changed by *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490.

Must Give Defense Instructions Where Appropriate

> In a guilt trial, the court must instruct sua sponte on legally available defenses, such as intoxication which may negate specific intent, when such defenses are supported by substantial evidence. [Citation.] Though there is no sua sponte duty at the penalty phase to instruct on the elements of "other crimes" introduced in aggravation [citation] when such instructions are given, they should be accurate and complete. [Citation.] We therefore assume, without deciding, that penalty instructions on the elements of aggravating "other crimes" should include, on the court's own motion if necessary, any justified intoxication instructions.

(*People v. Montiel* (1993) 5 Cal.4th 877, 942.)

Constitutional to Admit Other Crimes Evidence

> [I]n *People v. Balderas* (1985) 41 Cal.3d 144, , we stated: "we must also reject defendant's argument that other crimes are inadmissible per se in a penalty trial. Contrary to defendant's suggestion,

> admission of evidence of uncharged criminal violence does not impose the death penalty for a noncapital offense of which defendant was never convicted. Rather, the evidence of criminality, if proved beyond a reasonable doubt [citation] is simply one factor the penalty jury is to consider in deciding the appropriate punishment for the capital offense."

(*People v. Brown* (2003) 31 Cal.4th 518, 571.)

Must State Allegedly

The court must clearly refer to any prior crimes evidence offered by the prosecution as an "alleged" offense. (See *People v. Brown* (2003) 31 Cal.4th 518, 572.)

Need Not Instruct on Presumption of Innocence

> We are not persuaded that the 1978 death penalty law requires an instruction that the defendant is presumed innocent of unadjudicated offenses offered in aggravation or that the People bear the burden of proof on the issue: the "requirement" cannot be discerned either within the words of the statute or without. Nor are we persuaded that the United States Constitution requires the instruction in question. We have never held that the Constitution requires such an instruction -- neither, to our knowledge, has any other appellate court in a reported decision. And we decline to so hold now.

(*People v. Benson* (1990) 52 Cal.3d 754, 809-810.)

Need Not Instruct on Unanimity

"We see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proved beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty." (*People v. Benson* (1990) 52 Cal.3d 754, 811 [citation and quotation marks omitted].)

May Use as Prior Criminal Conduct and Prior Felony Conviction from Same Incident

> Where violent "criminal activity" results in a "prior felony conviction," it shows both a propensity for violence and an inability or unwillingness to be deterred by prior criminal sanctions. The jury was entitled to consider the relevance of defendant's prior conviction for both purposes under factors (b) *and* (c).

(*People v. Whitt* (1990) 51 Cal.3d 620, 654 [emphasis in original]; *People v. Yeoman* (2003) 31 Cal.4th 93, 156.)

704DP. Death Penalty: Conviction for Other Felony Crimes

The People allege as an aggravating circumstance that (the defendant/_____ <*insert name of defendant*>) was convicted of _____ <*insert name of felony conviction*> on _____ <*insert date of conviction*>. <*Repeat for each felony conviction alleged.*>

The People must prove (this/these) allegation[s] beyond a reasonable doubt. If you have a reasonable doubt whether (the defendant/_____ <*insert name of defendant*>) was convicted of an alleged crime, you must completely disregard any evidence of that crime. If the People have proved that (the defendant/_____ <*insert name of defendant*>) was convicted of an alleged prior crime, you may consider the fact of that prior conviction as an aggravating circumstance.

You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [except for the alleged criminal activity I discussed in the previous instruction].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that alleged prior felony convictions offered in aggravation must be proved beyond a reasonable doubt. (See *People v. Robertson* (1982) 33 Cal.3d 21, 53–55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.)

The prosecution must specify what convictions are alleged in aggravation, and the court has a **sua sponte** duty to instruct the jury to consider only evidence relating to those prior convictions. (See *People v. Robertson* (1982) 33 Cal.3d 21, 55; *People v. Yeoman* (2003) 31 Cal.4th 93, 151.)

To be admissible under factor (c), the defendant must have been convicted of the other felony offense prior to the commission of the offenses charged in the current case. (*People v. Balderas* (1985) 41 Cal.3d 144, 205; *People v. Kaurish* (1990) 52 Cal.3d 648, 702.)

Give the bracketed portion in the final paragraph when the court is also instructing the jury on prior violent crimes alleged in aggravation. (*See* Instruction 703DP, Death Penalty: Evidence of Other Violent Crimes.)

In *People v. Benson* (1990) 52 Cal.3d 754, 811, the Supreme Court held that the jury need not be unanimous about whether prior violent crimes offered under factor (b) have been proved beyond a reasonable doubt. The Supreme Court has not ruled on whether this also applies to prior felony convictions offered under factor (c). If the court determines that the jury need not be unanimous about whether prior felony convictions have been proved beyond a reasonable doubt, the court may, on request, add the following paragraph:

> Each of you must decide for yourself whether the People have proved that the defendant was convicted of an alleged crime. You do not all need to agree whether an alleged conviction has been proved. If any juror individually concludes that an alleged conviction has been proved, that juror may give the evidence whatever weight he or she believes is appropriate. On the other hand, if any juror individually concludes that an alleged conviction has not been proved, that juror must disregard the evidence completely.

If the case involves only one defendant, the court should use the word "defendant" throughout the instruction. If the case involves codefendants tried jointly, the court should insert the name of the specific defendant alleged to have been convicted of the prior felony in the places indicated in the instruction.

AUTHORITY

Factor (c) ▸ Pen. Code, § 190.3.

Must Be Proved Beyond a Reasonable Doubt ▸ *People v. Robertson* (1982) 33 Cal.3d 21, 53–55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.

Must Pre-Date Current Offense ▸ *People v. Balderas* (1985) 41 Cal.3d 144, 205; *People v. Kaurish* (1990) 52 Cal.3d 648, 702.

Defendant May Raise Constitutional Challenge to Prior ▸ *People v. La Fargue* (1983) 147 Cal.App.3d 878, 890.

Out-of-State Convictions ▸ *People v. Lang* (1989) 49 Cal.3d 991, 1038–1039.

Constitutional to Admit Evidence of Prior Convictions ▸ *People v. Kaurish* (1990) 52 Cal.3d 648, 701.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 474.

RELATED ISSUES

Out-of-State Felony Convictions

"In the absence of limitation, a reference to 'prior felony convictions' is deemed to include any prior conviction which was a felony under the laws of the convicting jurisdiction." (*People v. Lang* (1989) 49 Cal.3d 991, 1038–1039.) Thus, the out-of-state prior does not have to qualify as a felony under California law. *(Ibid.)*

Constitutional Challenge

The defendant may bring a constitutional challenge to the validity of the prior conviction. (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 890.) If the conviction is from another country, the defendant may challenge the prior on the basis that the foreign jurisdiction does not provide the procedural safeguards mandated by the United States Constitution. *(Ibid.)*

Evidence of Charges and Underlying Facts Not Admissible, Only Conviction

"Because the . . . burglaries were nonviolent crimes, only evidence authenticating defendant's *conviction* for these crimes was relevant and admissible under section 190.3, factor (c). Unlike violent criminal activity admissible under factor (b), the *charges* leading to a conviction of a nonviolent crime are inadmissible." (*People v. Kaurish* (1990) 52 Cal.3d 648, 703 [emphasis in original]; *People v. Stanley* (1995) 10 Cal.4th 764, 819 [facts admissible under factor (b) but not under factor (c)].)

STAFF NOTES

Pen. Code, § 190.3, in relevant part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [. . .]
>
> (c) The presence or absence of any prior felony conviction.

Conviction for Other Crime Must Pre-date Commission of Current Offense

> We find merit in defendant's contention that the "prior felony [convictions]" described in subdivision (c) of section 190.3 are limited to those entered *before commission* of the capital crime. California courts have consistently so interpreted statutes which call for harsher penal treatment on the basis of "prior convictions."

(*People v. Balderas* (1985) 41 Cal.3d 144, 205 [italics in original].)

> "[P]rior" conviction in this context means that the conviction, not merely the act for which the defendant was convicted, occurred prior to the commission of the capital offense.

(*People v. Kaurish* (1990) 52 Cal.3d 648, 702.)

Constitutional Challenge to Prior

> The California Supreme Court has also stated that "an individual may challenge the constitutional validity of a prior conviction whenever it is used as a basis for augmenting punishment." (*In re Rogers* (1980) 28 Cal.3d 429, 433.)

(*People v. La Fargue* (1983) 147 Cal.App.3d 878, 890.) In *People v. La Fargue, supra,* the Court of Appeals held that the defendant could challenge the constitutionality of a prior from Cuba, observing,

> While there is a logical basis, absent some challenge, to presume procedural safeguards for convictions suffered in the United States, such a presumption does not attend convictions from foreign countries where courts are not bound by our federal Constitution.

(*Ibid.*)

705DP. Death Penalty: Weighing Process

You have sole responsibility to decide which sentence (the/each) defendant will receive.

You must consider the arguments of counsel and all of the evidence presented [during (both/all) phases of the trial] [except for the items of evidence I specifically instructed you not to consider].

In reaching your decision, consider and weigh the aggravating and mitigating circumstances. Weighing aggravating and mitigating circumstances does not mean a mere mechanical counting of the number of factors on each side of a scale. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors, not the relative number of factors.

Determine which sentence is appropriate by considering all of the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances, if any, are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

To return a verdict of death or life without the possibility of parole, all 12 of you must agree on that verdict.

[You must separately consider which sentence to impose on each defendant. If you cannot agree on the sentence for one [or more] defendant[s] but you do agree on the sentence for the other defendant[s], then you must return a verdict for (the/each) defendant on whose sentence you do agree.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jury on the weighing process in a capital case. (*People v. Brown* (1985) 40 Cal.3d 512, 544; *People v. Benson* (1990) 52 Cal.3d 754, 799.)

Following this instruction, the court **must give** Instruction 140, Predeliberation Instructions, explaining how to proceed in deliberations.

AUTHORITY

Death Penalty Statute ‣ Pen. Code, § 190.3.
Error to Instruct "Shall Impose Death" ‣ *People v. Brown* (1985) 40 Cal.3d 512, 544.
Must Instruct on Weighing Process ‣ *People v. Brown* (1985) 40 Cal.3d 512, 544; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Duncan* (1991) 53 Cal.3d 955, 977–979.
Aggravating Factors "So Substantial in Comparison to" Mitigating ‣ *People v. Duncan* (1991) 53 Cal.3d 955, 977–979.
Error to Instruct on Commutation ‣ *People v. Ramos* (1982) 37 Cal.3d 136, 159.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 466, 467, 493, 494, 496, 497.

RELATED ISSUES

No Presumption of Life and No Reasonable Doubt Standard
The court is not required to instruct the jury that there is a presumption in favor of a life sentence; that the aggravating factors (other than prior crimes) must be found beyond a reasonable doubt; or that the jury must find beyond a reasonable doubt that the aggravating factors substantially outweigh the mitigating factors. (*People v. Benson* (1990) 52 Cal.3d 754, 800; *People v. Miranda* (1987) 44 Cal.3d 57, 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779.)

Unanimity on Factors Not Required
The court is not required to instruct the jury that they must unanimously agree regarding any aggravating circumstance. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779.)

Commutation Power
It is error for the court to instruct on the governor's commutation power unless specifically requested by the defense. (*People v. Ramos* (1982) 37 Cal.3d 136, 159.) If the jury inquires about commutation, the court may inform the jury that the governor has the power to commute either sentence, but the jury may not consider this in reaching its decision. (*Id*. at 159, fn. 12; see 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 496 [collecting cases in which court required to respond to inquires from jury regarding commutation].) The court must not state or imply to the jury that the ultimate authority for which sentence shall be imposed lies elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329.)

Deadlock—No Duty to Inform Jury Not Required to Return Verdict
"[W]here, as here, there is no jury deadlock, a court is not required to instruct the jury that it has the choice not to deliver any verdict." (*People v. Miranda* (1987) 44 Cal.3d 57, 105.)

Deadlock—Questions From the Jury About What Will Happen
If the jury inquires about what will happen in the event of a deadlock, the court should refuse to answer. (*People v. Bell* (1989) 49 Cal.3d 502, 553.)

No Duty to Instruct Not to Consider Deterrence or Costs
"Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Benson* (1990) 52 Cal.3d 754, 807 [citation and internal quotation marks omitted].) Where "[t]he issue of deterrence or cost [is] not raised at trial, either expressly or by implication," the court need not instruct the jury to disregard these matters. *(Ibid.)*

STAFF NOTES

Note: Underlined portions of quotes represent language that has been incorporated into the instruction.

Pen. Code, §190.3, in relevant part:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

"Shall Impose Death"—Error; Must Instruct on "Weighing"

As noted above, the statute states that the jury "*shall* impose a sentence of death" if aggravation outweighs mitigation. (Pen. Code, § 190.3.) Literal application of this provision would be unconstitutional. (See *People v. Brown* (1985) 40 Cal.3d 512, 544.) Thus, in *People v. Brown, supra,* the court interpreted the statute as never mandating the imposition of a death sentence but, rather, as requiring a "weighing process" in which the jury is always free to chose a sentence of life without parole. The court stated,

> In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it.

(*Id.* at p. 541.)

The court then disapproved of any instruction using the phrase "shall impose a sentence of death":

> We acknowledge that the language of the statute, and in particular the words "shall impose a sentence of death," leave room for some confusion as to the jury's role. Indeed, such confusion is occasionally reflected in records before this court. For that reason, trial courts in future death penalty trials -- in addition to the instruction called for by *Easley, supra,* 34 Cal.3d at page 878, footnote 10 -- should instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in this opinion.

(*Ibid.* at fn. 17; see also *People v. Miranda* (1987) 44 Cal.3d 57, 102.)[1]

Following *People v. Brown, supra,* the CALJIC instruction was revised to reflect the holdings in the case. The court approved of the revised language in *People v. Duncan* (1991) 53 Cal.3d 955, 977-979:

> The instruction read as follows: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant. [para.] After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [para.] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [para.] You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree." [. . .]

[1] The instruction called for in footnote 10 of *Easley* is incorporated in Task Force Instruction 702DP: Factors to Consider.

> In *People* v. *Brown, supra*, 40 Cal.3d 512, we noted that instruction in the terms of the statute had the potential to confuse jurors and thus suggested the adoption of an instruction like the one given here. (*Id*. at p. 545, fn. 19.) The instruction given informed the jurors that to return a verdict of death they must be persuaded that the "aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." We do not think that there is a reasonable likelihood that any of the jurors would have concluded that, even if the mitigating factors outweighed those in aggravation, the "so substantial in comparison with" language nevertheless might demand imposition of the higher punishment. (See *Boyde* v. *California* (1990) 494 U.S. 370.) The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty). [. . .]
>
> [O]ur statute and instruction give the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(*Ibid.*)

In subsequent cases, the court explicitly approved of the portion of the CALJIC instruction that, "weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale . . . . (CALJIC No. 8.88.)." (*People v. Smith* (2003) 30 Cal.4th 581, 638; (*People v. Benson* (1990) 52 Cal.3d 754, 800.) The court has also approved of the language from the CALJIC instruction stating, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (*People v. Ochoa* (1998) 19 Cal.4th 353, 454; *People v. Benson* (1990) 52 Cal.3d 754, 800.)

No Sua Sponte Duty to Instruct on Meaning of Life Without Parole

> In this case, the term "confinement in the state prison for life without possibility of parole" was used in the common and nontechnical sense that

> the plain meaning of the words convey. Accordingly, the court was not required to give an instruction as to its meaning sua sponte.

(*People v. Ochoa* (1998) 19 Cal.4th 353, 457 [citations and quotations marks omitted].)

On Request, May Instruct that Death Sentence Will be Carried Out, But Not Required to so Instruct

> As we have explained in prior cases, because of the possibility of appellate reversal or gubernatorial commutation or pardon, it would be erroneous to instruct the jury that if it returns a death verdict, the sentence of death will inexorably be carried out. But the trial court may give such an instruction at the defendant's request. [Citations.].

(*People v. Cox* (2003) 30 Cal.4th 916, 967.) The court may also give an instruction that the jury should assume that the sentence of life without parole will be carried out but is not required to do so. (*Ibid.*; *People v. Smith* (2003) 30 Cal.4th 581, 635.)

May Not Imply to Jury Duty to Choose Sentence Lies Elsewhere

> It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

(*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329.)

Error to Instruct on Commutation Power

Penal Code section 190.3 states:

> The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

The court has held that this instruction, dubbed the "Briggs Instruction," is error:

> Accordingly, we conclude that the Briggs Instruction violates the due process clause of the California Constitution both because it is misleading and because it invites the jury to consider speculative and

> impermissible factors in reaching its decision. If this case reaches the penalty phase on remand, the instruction should not be given. n12

(*People v. Ramos* (1982) 37 Cal.3d 136, 159.) In a footnote, the court discussed whether the jury should ever be instructed on commutation:

> n12 While the Briggs Instruction clearly should not be given, there is a legitimate question whether in general a trial court should instruct the jury *sua sponte* that it should not consider the possibility of commutation in reaching its decision, or whether no instruction on the subject should be given at all.
>
> When the jury raises the commutation issue itself -- either during voir dire or in a question posed to the court during deliberations -- the matter obviously cannot be avoided and is probably best handled by a short statement indicating that the Governor's commutation power applies to both sentences but emphasizing that it would be a violation of the juror's duty to consider the possibility of such commutation in determining the appropriate sentence. (Cf. *People* v. *Morse, supra*, 60 Cal.2d 631, 648.)
>
> When the issue is not expressly raised by the jury, it is a close question whether it is preferable for the court to give such a cautionary instruction on the assumption that some jurors might otherwise be aware of the possibility of commutation and improperly consider it, or whether such an instruction is simply more likely to bring the matter to the jury's attention and, as a practical matter, be difficult to follow.
>
> A similar problem has arisen in the Fifth Amendment realm, with respect to an instruction that cautions the jury that it may not draw an adverse inference from the fact that a defendant has not testified at trial. In that context, California courts have held that while such an instruction must be given if requested by the defendant, a trial court has no duty to give the instruction *sua sponte* in light of the possibility that it would prove more prejudicial than beneficial. (See, e.g., *People* v. *Gardner* (1969) 71 Cal.2d 843, 852-854 [79 Cal.Rptr. 743, 457 P.2d 575].) A similar approach -- permitting the defendant to assess the relative cost and benefit of a cautionary instruction in a particular case -- appears appropriate with regard to the commutation issue.

(*Ibid.;* see 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punish, § 496 [collecting cases in which court required to respond to inquires from jury regarding commutation].)